

## Louisiana Law Review

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Volume 60 | Number 4

*Conflict of Laws, Comparative Law and Civil Law: A*

*Tribute to Symeon C. Symeonides*

*Summer 2000*

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Zoé Papassiopi-Passia

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### Repository Citation

Zoé Papassiopi-Passia, *The Applicable Law on Divorce and the "Ordre Public" Reservation in Greek Conflict of Laws*, 60 La. L. Rev. (2000)  
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# The Applicable Law on Divorce and the "Ordre Public" Reservation in Greek Conflict of Laws

Zoé Papassiopi-Passia\*

## I. INTRODUCTION

In a classical conflict of laws system like that of Greece, with its classical and mainly plurilateral choice of law rules embracing the legal situation under adjustment, the connecting factor, and the applicable law,<sup>1</sup> however much such a system may have been influenced by the new trends that are appearing around the world, there are always certain mechanisms, like the "ordre public" reservation, that remain unchanged.<sup>2</sup> In simple terms, these mechanisms have the happy faculty of

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\* Associate Professor of Private International Law, Aristotelian University of Thessaloniki, Greece. In the matter of the applicable law on divorce, Greek conflict rules address the question of the determination of the law applicable to the individual divorce case in more or less the same manner as most legal systems in continental Europe: that is, legal situation, automatically established by the corresponding concept of substantive law, connection, in the form of a succession of connecting factors, and applicable domestic or foreign law. By contrast, the codification of private international law in Louisiana (which was drafted by Professor Symeon Symeonides, an old friend and colleague from the Aristotle University of Thessaloniki, Greece), adopts a rule which (as the author himself admitted) "is so peculiar that it should not even be considered as a rule of Private International Law." S. Symeonides, *Modern Codification Approach to Private International Law: The Case of Louisiana* (in Greek), in *Révue Hellénique de Droit Européen* 952, 974 (1994).

The specific provision of the private international law of Louisiana (Louisiana Civil Code article 3521, which states that domestic courts may grant a divorce or legal separation only for grounds that are clearly provided for in domestic law), which thus imposes the application of the *lex fori* in cases of divorce or legal separation, demonstrates the continued force in America of the perception that these matters, being of direct concern to the State involved in each instance, touch upon the question of jurisdiction and that the applicable law is therefore the law of the forum.

As an outsider viewing the Louisiana approach to choice of law on divorces (to paraphrase the title of the dissertation published by Symeon Symeonides when he attempted, as a European jurist, to comprehend the American approach to conflict of laws (S. Symeonides, *An Outsider's View of the American Approach to Choice of Law: Comparative Observations on Current American and Continental Conflicts Doctrine*, (1980)), I am equally disconcerted by the totally different methodological approach taken by Louisiana on matters of divorce in its private international law, compared to corresponding codes in continental Europe.

For the purposes of my participation in this special issue of the *Louisiana Law Review* in honor of Symeon Symeonides, the spiritual father of the Louisiana codification of private international law, I shall limit myself to a discussion of one small aspect of the methodological approach of Greek conflict rules in matters of divorce and judicial separation: specifically, to the case in which the applicable law is foreign and is contrary to Greek public policy, showing how different our legal system is compared to that of Louisiana.

1. G. Maridakis, *Private International Law* (in Greek) I 1967<sup>2</sup>, II 1968<sup>2</sup>; E. Krispis, *Private International Law* (in Greek) General Part 1970; D. Evrigenis, *Private International Law* (in Greek) 1973; S. Vrellis, *Private International Law* (in Greek) 1988; A. Grammaticaki-Alexiou, et al, *Private International Law* (in Greek) (1998).

2. From the Greek bibliography see P. Vallindas, *The "ordre public" Clause*, in *Private International Law* (in Greek) 1937; H. Krispi-Nicoletopoulou, *Observations on the Greek jurisprudence*

being adaptable to time, so that they can accommodate the contemporary requirements of the law.

In the case of divorce, when the Greek judge is obliged by the requirements of the conflict rule of Article 16 of the Greek Civil Code to apply a foreign law, and when such provision upholds the indissolubility of marriage or recognizes the repudiation of a wife by her husband or adopts a method of dissolution of a marriage that is not only unfamiliar but indeed clearly contrary to the perception of divorce expressed in Greek law, it follows that he will be sorely perplexed. In the end, he will invoke the public policy reservation of Article 33 of the Greek Civil Code, according to which "the provisions of a foreign law shall not apply if the application thereof is contrary to morality or in general to public policy."<sup>3</sup>

According to Article 16 of the Greek Civil Code, "divorce and judicial separation shall be governed by the law that governs the personal relations between spouses at the time of the initiation of the divorce or separation proceedings."<sup>4</sup> This provision, in conjunction with the provisions of Greek Civil Code Article 14 on personal relations between spouses, takes the following form:

Divorce and judicial separation are governed: (a) by the law of the last common nationality shared by the spouses during the period of the marriage and the initiation of the divorce or judicial separation proceedings, if at that point one of them still has it, (b) by the law of the last common habitual residence shared by the spouses during the period of the marriage and the initiation of the divorce or judicial separation proceedings (regardless of whether either of the spouses still maintains it), (c) by the law to which the spouses are most closely connected at the time of initiation of the divorce or separation proceedings.

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concerning the notion of the "public order" clause of art. 33 CC (in Greek), in Nomiko Vima 1970.641 seq.; P. Vallindas, *La réserve de l'ordre public en droit international privé*, Revue Hellénique de Droit International 1950.270 ff; P. Vallindas, *Der Vorbehalt des "ordre public" im internationalen Privatrechts*, ZfauIIPR 1953.1ff. From the international bibliography see, inter alia, A. Spickhoff, *Der ordre public im internationalen Privatrecht. Entwicklung. Struktur. Konkretisierung*, 1989; Ph. Francescakis, "Ordre public." Répertoire Dalloz, B. Dutoit, *L'ordre public, caméléon du droit international privé*, Mélanges Flattet 455 (1985); F. Vischer, *Der ordre public im Familienrecht*, R.E.C. 324 (1969); E. Jayme, *Methoden der Konkretisierung des ordre public im internationalen Privatrechts*, 1989; P. Lagarde, *Recherches sur l'ordre public en droit international privé*, 1959, J. Maury, *L'éviction de la loi normalement compétente: l'ordre public international et la fraude à la loi*, 1952.

3. S. Vrellis, Art. 33 CC in Georgiades/Stathopoulos, *General Principles of the Greek Civil Code* (in Greek), 1978; H. Krispi-Nicoletopoulou, *The Public Order Clause (33 CC) on International Divorces* (in Greek), in Nomiko Vima 297 (1957).

4. Z. Papassiopi-Passia, *The Applicable Law on Divorce in Greek and International Conflict of Laws*, (in Greek) 95 (1997); A. Grammaticaki-Alexiou, *Private International Law. Questions of Family Law* (in Greek) 1983; J. Voulgaris, *Private International Law. Special Part: Family Relations (New Provisions)* (in Greek) 1987<sup>2</sup>; J. Deliyannis, *The Private International Law of the Spouses' Relations* (in Greek) in *Revue Hellénique de Droit Européen* 277 (1986).

The connecting factors cited are serial, meaning that if the judge of the forum is unable to apply the first he will turn to the next, which thus from a subsidiary connection becomes a principal connection.

If, in application of Greek Civil Code Article 16, the Greek judge is led to apply a foreign law to the relevant case of divorce brought before him, he must weigh and appreciate whether such application, and in particular the application of the specific foreign provision, is reconcilable with domestic public order and morality. "Application" of the foreign provision, therefore, means not only the legal consequence that will result through the Article 16 rule, but also the effect that this legal consequence will have on any decision relating to its implementation.<sup>5</sup> It is impossible to formulate sure and certain criteria which the judge of the forum may apply in his efforts to determine whether a foreign provision is contrary to domestic public policy. This is something that can only be decided for each specific case that is brought before the courts for adjudication.

The content of the public policy reservation, of course, varies not only from place to place, that is to say in different states, but also from time to time. And the character of the public policy reservation is current, meaning that it draws its content from the fundamental social, political and moral perceptions prevailing in domestic public policy at any given time.

It is obvious that these perceptions are subject to the effects of time. Thus, something that at one time is held to be contrary to public policy is not so regarded at another. For example, prior to the institution of Law 1329/1983 (which amended certain provisions in the Civil Code, in the Code of Civil Procedure and in other Codes because of the introduction of the principle of equality of sexes), divorce by consent was held to be against Greek public policy.<sup>6</sup> Today, however, the dissolution of a marriage by common consent of the spouses, which is now recognized by substantive Greek law as a valid ground for divorce, is no longer held to be contrary to public policy in Greece.

Moreover, the legislative reform that was effected in Greece with the passage of Law 1329/1983 was itself the result of the need that had arisen out of the different attitude to divorce in contemporary society in relation to its moral and social perceptions of justice.<sup>7</sup>

It is equally probable that what today constitutes a fundamental concept of Greek legislation may in the near future cease to be a basic and fundamental concept of domestic law and order. A change in the content of the public policy reservation is usually signalled by a change in those provisions in domestic legislation that shape the perception of justice in a certain area of our law. For there

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5. H. Krispi-Nicoletopoulou, *supra* note 3; D. Evrigenis, *The Private International Law in the Greek Jurisprudence*, in Armenopoulos 409 (1964); Z. Papassiopi-Passia, *supra* note 4, at 190.

6. D. Evrigenis, *supra* note 1, at 162; Athens Court 24851/1984 in *Revue Hellénique de Droit International* 170 (1965); Athens Court 8699/1978, in *Nomiko Vima* (in Greek) 446 (1979).

7. See Introductory Report of Law 1329/1983, especially article 1441 CC concerning divorce by consent.

to be any change in legislation, therefore, there must first be a clear and indisputable change in the fundamental perceptions of domestic law and order.<sup>8</sup>

Consequently, the judge of the forum cannot merely ascertain whether in general the specific foreign provision is contrary to domestic law, but he must also determine in particular whether the application of such provision really endangers the validity of the fundamental moral and socio-economic values of the domestic system of justice.<sup>9</sup> These fundamental concepts are deduced from the spirit of the entire body of Greek legislation.

With regard to the application of foreign provisions on divorce by the Greek judge, we must distinguish between cases where the foreign provision is invoked through the conflict rule in Greek Civil Code Article 16 as applicable to govern a case where the divorce is the principal matter, and cases where the divorce is an incidental question. While the judge may invoke the public policy reservation in both of these situations, the specific approach adopted in each of the two cases may well have been different. The same may be said in cases where the public policy reservation is invoked in the recognition of a foreign divorce as *res judicata* in the domestic legal situation. This last instance, however, is outside the scope of this present article.

## II. APPLICABLE FOREIGN LAW ON DIVORCE AND LEGAL SEPARATION AND THE *ORDRE PUBLIC* RESERVATION

The invocation of the Greek Civil Code Article 33 public policy reservation in cases of divorce has varied considerably in Greek private international law, both in theory and in case law.

Formerly, it was accepted that for a divorce to be granted in Greece by application of foreign law, the grounds for the divorce had to be recognized by Greek law as well.<sup>10</sup> Although this view had been recognized as wrong in theory,<sup>11</sup> many decisions based on this position were nonetheless handed down by Greek courts.<sup>12</sup>

This position is certainly wrong. When the Greek judge is invited by the conflict rule of Greek Civil Code Article 16 to apply the designated applicable foreign law (*lex causae*), he is obliged first of all to discover the applicable

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8. P. Vallindas, *supra* note 2, and all the authors cited *supra* note 2.

9. P. Vallindas, *supra* note 2, at 147; D. Evrigenis *supra* note 1, at 169; E. Krispis, *supra* note 1, at 386; G. Maridakis *supra* note 1, at 342; S. Vrellis, *supra* note 3; A. Grammaticaki-Alexiou, et al *supra* note 1, at 83.

10. J. Spyropoulos, Private International Law (in Greek) 412 (1938); G. Streit & P. Vallindas, Private International Law (in Greek) II 376 (1937); G. Maridakis, The Divorce in Private International Law 49 (1925).

11. D. Evrigenis, *supra* note 5, at 64; H. Krispi-Nicoletopoulou, *supra* note 3, at 297; H. Krispi-Nicoletopoulou, *supra* note 2, at 64; S. Vrellis, Annotations under Patra Court 218/1973 in Diki 430 (1974) (in Greek).

12. Inter alia see Syros Court 73/1952 in Themis 657 (1952), Athens Court of Appeal 535/1957 in Efimeris Ellinon Nomikon 588 (1957), Athens Court of Appeal 2860/1969 in Nomiko Vima 574 (1970).

substantial provisions on divorce contained in this body of law. Foreign law is today approached as just, and the judge of the forum must at all costs discover it, determine it and interpret it.<sup>13</sup> Only after the foreign provision applicable in the case before the court has been identified is the judge of the forum required to determine, with great care and before handing down his final decision, whether the application of the specific provision is reconcilable with the legal, social, moral, civil, economic and religious regime of the Greek state.<sup>14</sup>

This obligation lies, as has been said, "in the examination of the effects of the application or non-application *in concreto* of a certain foreign rule of law in the specific forum."<sup>15</sup> In determining whether or not to invoke the public policy reservation in order to reject the application of the specific foreign provision, the judge of the forum must decide whether it conflicts with the fundamental tenets of domestic law and order in such a way that its application would disturb the legal structure of the forum. It is evident that, while on the one hand no such disturbance is created by the fact that the grounds for divorce are not the same in the applicable foreign law as in domestic law, there would on the other hand be a serious conflict with the tenets of domestic law and order and public morals if the judge of the forum were to take into consideration a foreign provision on divorce which, for example, recognized the unilateral right of the husband to expel his wife from the matrimonial home. The institution of unilateral repudiation, which is recognized in many Islamic legal systems, whereby a husband may divorce his wife—even in her absence—by thrice crying "*talaq*" (literally, "I divorce you") before witnesses, will not be accepted by a Greek judge as the basis for a divorce, because this is something that our society holds as intolerable.<sup>16</sup> The reason for this is not that such a thing is unknown in Greek law but that, first and foremost, this institution is contrary to the principle of the equality of the sexes and, further, that it is a private act without the security of the fair and impartial judgement of an entity specific to the purpose.

As far as we know, the institution of *talaq* has not occupied the Greek courts except as an incidental matter or in the form of recognition of a *res judicata*,<sup>17</sup> not, that is, as a principal question. There is, however, every likelihood that it is something that will have to be considered in the future, given the fact that in this age there has been a movement of people from Islamic states arriving in Greece, as immigrants or political refugees, and taking up residence either temporarily or permanently in this country.

The problem has, however occupied the courts of France, England, Belgium and Germany, as well as those of a number of other European countries as well,

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13. A. Grammaticaki-Alexiou, *Problems Concerning the Application of the Applicable Foreign Law* (in Greek) in Armenopoulos 527 (1976); Ch. Pamboukis, *The Procedural Knowledge of Foreign Law* (in Greek) in *Mélanges in Honour to Elia Krispi*, 297 (1995).

14. See the authors cited *supra* note 1.

15. By S. Vrellis, *supra* note 1, at 78.

16. See the authors cited *supra* note 2.

17. Athens Court of Appeal 10719/1995, in *Elliniki Dikaïossini* 638 (1997) commented by M. Margaritis.

precisely because these countries have been accepting immigrants from Muslim countries for many years. The problems created in these countries by institutions such as polygamy and *repudium* (the unilateral repudiation of a wife by her husband) have forced their theorists and their courts to examine these "exotic" institutions of Islamic law in depth, forming a clear picture of their content and frequently acting upon the public policy reservation rule adopted in their legal systems.<sup>18</sup>

In Greece, the public policy reservation rule is unquestionably applicable where the Islamic institution of *talaq* is invoked as the applicable foreign provision for the granting of a divorce, in contrast to cases where a repudiation is presented as having acquired vested rights abroad.<sup>19</sup>

With regard to instances where the *lex causae* leads us to the legal institution of the indissolubility of marriage, our courts have accepted both the view that it is not contrary to Greek public policy and the view that it is. Legal theory has also varied in its perception of this institution.

The indissolubility of marriage was of course maintained by the legal systems of countries influenced by the Roman Catholic Church. Formerly, countries like Spain, Brazil, Italy and (until recently) Ireland neither recognized nor permitted the dissolution of a marriage, although they did accept the institution of *separatio quoad torum et mensam*, or separation from bed and board. This institution, however, did not lead to the dissolution of the marriage, but solely to the separation of the spouses from marital co-habitation. Today, few countries hold that marriage is an indissoluble institution.

The initial position of Greek theory and jurisprudence<sup>20</sup> was that the indissolubility of marriage was not contrary to domestic public policy: "The indissolubility of marriage, which is accepted by the law of the nationality which the spouses had during the marriage and before the initiation of the action, is not contrary to public policy, since it is the preservation of marriage and not its

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18. I. Fadlallah, *Vers la reconnaissance de la répudiation musulmane par le juge français?* RevCrit 17 (1981); G. Van Hecke, *Le mariage polygamique devant les tribunaux belges*, RevCritJB 7 (1971); J. Déprez, *Droit international privé et conflits de civilisations. Aspects méthodologiques. Les relations entre systèmes d'Europe occidentale et systèmes islamiques en matière personnel*, RCADI 211, 217 (1988-IV); Fr. Monéger, *Vers la fin de la reconnaissance des répudiations musulmanes par le juge français?* Clunet 347 (1992); J. Lenoble, *Répudiation en droit international privé belge*, J.T. 165 (1985); E. Jayme, *Talaq nach iranischem Recht und deutscher Ordre Public*, IPRax 223 (1989); J.Y. Carlier, *La reconnaissance en Belgique des répudiations unilatérales intervenues au Maroc ou l'ordre public répudie?* J.T. 101 (1985); P. Mercier, *Conflits de civilisations en droit international privé. Polygamie et répudiation*, 1972, R. Benattar, *Ordre public et la reconnaissance des "divorces privés"*, Festschrift für W. Wengler II. 177 (1973); P. Lagarde, *La théorie de l'ordre public international face à la polygamie et à la répudiation. L'expérience française*. Hommages à François Rigaux 263 (1993); Roula El. Hussein, *Le droit international privé français et la répudiation islamique*, RevCrit 427 (1999).

19. See *infra* Part III.

20. For this jurisprudence see G. Maridakis, *supra* note 10; G. Steit & P. Vallindas, *supra* note 10; A. Bendermacher-Gerosius, *Divorce and Separation in Greek Private International Law* 27 (1960).

dissolution that is of concern to public policy" decreed the Athens Court of Appeal (535/1957).<sup>21</sup>

Later this position changed to support the more correct view that the indissolubility of marriage is in fact contrary to Greek public policy.<sup>22</sup> Thus, in a case regarding the dissolution of a marriage of Irish nationals,<sup>23</sup> the Athens Court of First Instance concluded that the indissolubility recognized by the applicable Irish law was contrary to Article 33 of the Greek Civil Code and simultaneously determined that Greek law was applicable instead.<sup>24</sup> The court, however, also appears to have been bothered by the fact that the plaintiff was a Greek woman who had acquired Irish nationality by her marriage, which meant that admission of the foreign provision accepting the indissolubility of marriage would lead to an unfavorable result, overturning the constitutionally established principle of the equality of the sexes. However, in the contrary situation, a Greek man who had married an Irish wife could be divorced, since in that case the applicable law would be that of Greece.<sup>25</sup> The opinion of the reviewer of the above decision is categorical in its praise for the boldness of the Greek court in its view of the indissolubility of marriage, especially with regard to the issue of unequal treatment of the spouses.<sup>26</sup>

Apart from the above, the application of the foreign provision—in this case of Irish law—offends other rules of Greek law, and particularly that of Article 4 of the Civil Code, when the equality between national and non-national established by the said Article 4 results in application in an unreasonable inequality in favor of the non-national, a situation which we believe is irreconcilable with public policy given that a Greek woman married to an Irish man cannot be divorced from him (since in either case in accordance with Article 16 CC the applicable law is that of Ireland). Whereas an Irish woman married to a Greek man can be divorced from

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21. Athens Court of Appeal. With the same opinion Athens Court of Appeal 4198/1970 in Armenopoulos 419 (1971).

22. E. Krispis, *supra* note 1, at 391; Gr.-E. Kalavros, Observations on Article 16 CC in Georgiadis & Stathopoulos, General Principles of the Greek Civil Code (in Greek) (1978); S. Vrellis, *supra* note 1, at 181; A. Grammaticaki-Alexiou, *supra* note 1, at 108; G. Papadimitriou, Commentary of the New Provisions of Family Law Vol. A` 34 (1984).

23. The wife was Greek at the time of her marriage and by her marriage to an Irish citizen acquired the nationality of her husband, in accordance with the provisions of Article 16 of the Greek Nationality Code of 1955, before this was repealed by Law 1438/1984.

24. Athens Court 17130/1975 in Nomiko Vima 447 (1976), with comments by A. Varymbombiotis:

[I]t is obvious that this provision in the foreign law, which establishes the indissolubility of marriage during the lifetime of the spouses, is diametrically opposed to Greece's age-old principle of traditionally accepting that marriages may be dissolved, and is consequently contrary to domestic public policy, for which reason and in accordance with Article 33 of the Civil Code the application of the foreign (Irish) law must be rejected and Greek law applied in its stead.

25. Because a foreign woman who married a Greek man upon her marriage automatically acquired Greek citizenship, in accordance with Article 4 of the Greek Nationality Code then in effect, Greek law would therefore be applicable to both spouses.

26. A. Varymbombiotis, *supra* note 24.



him at any time and for insignificant cause, it being sufficient that the marital relationship has been severely shaken and that further marital cohabitation has thus become impossible.<sup>27</sup>

In cases where the *lex causae* leads the Greek judge to the application of a foreign statute which provides for the institution, unknown in Greek law, of legal separation from bed and board, it has been argued that the public policy reservation should be implemented on the grounds that this institution prohibits the spouses from concluding a new marriage.<sup>28</sup> This notwithstanding, however, the institution is not, in fact, contrary to Greek public policy, because the legal situation set out in Article 16 of the Greek Civil Code included this institution in the legal situation under adjustment.<sup>29</sup> Article 16 of the 1946 Civil Code spoke of "Divorce and separation from bed and board." Article 16 of the Civil Code as currently in effect speaks of "Divorce and legal separation."

Consequently, a foreign provision that accepts legal separation as grounds for divorce cannot be held by a Greek judge to be contrary to Greek public order, since the private international law rule in Greek law allows him to subsume it within the legal situation of Article 16 of the Civil Code, while at the same time determining which law shall be applicable. Legal separation, then, will only conflict with domestic public policy when by reason of the grounds for separation its application is held by the judge of the forum to be offensive to the fundamental principles of Greek law on marriage and divorce.<sup>30</sup>

It is precisely this appreciation on the part of the judge of the forum, that the application of a specific foreign provision is contrary to the fundamental principles and precepts of Greek law, that entitles us to invoke the public policy reservation in order to reject the application of the same in the Greek legal situation. The mere fact that application of a foreign provision contravenes a provision of Greek *jus cogens* law, or that the said provision is unknown in Greek law, is insufficient to lead us to exclude its application for reasons of public policy. By the same token, the fact that the domestic statute contains a provision similar to that of the applicable foreign law does not of itself preclude the possibility of conflictual variance between the application of such foreign provision and Greek public policy.<sup>31</sup> That is, the fact that the application of a foreign provision does not contravene a certain Greek provision does not necessarily mean that its application is not contrary to

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27. It should be noted that this decision was handed down in 1975, immediately after the passage into law of the 1975 Constitution, which established the equality of the sexes as a constitutional principle, while the provision of Article 16 of the Civil Code had not yet been amended, so that the applicable law was that of the common nationality of the two spouses, or else that of the nationality of the husband. The Greek Nationality Code had not yet been amended either.

28. G. Maridakis, *Divorce of aliens in Greece* (Law 3222 of 1924 article 3) (in Greek) 42 (1993); J. Spyropoulos, *supra* note 10, at 410; G. Papadimitriou, *supra* note 22, at 34.

29. About the relevant discussion see Z. Papassiopi-Passia, *supra* note 4, at 17.

30. H. Krispi-Nicoletopoulou, *supra* note 3, at 301.

31. P. Vallindas, *supra* note 2, at 110; G. Maridakis, *supra* note 1, at 346; E. Krispis, *supra* note 1 at 370; S. Vrellis, *supra* note 3, at 60; A. Grammaticaki-Alexiou, et al., *supra* note 1, at 81.

Greek public policy.<sup>32</sup> Any foreign provision whose application *in concreto* would disturb the perceptions of Greek society with regard to law and morality is contrary to Greek public policy.

When the judge of the forum invokes the public policy reservation of Greek Civil Code Article 33 and rejects the foreign provision on divorce applicable through Greek Civil Code Article 16, the question that arises is, what does he do next? Does he refuse to grant the divorce? Does he apply another provision of the applicable foreign law? Or, does he end up applying the *lex fori*? Here too, we think, the judge of the forum will act *in concreto*.<sup>33</sup> If, for example, he finds himself required to apply a foreign provision that upholds the indissolubility of marriage, he will probably reject the application of this provision and apply the *lex fori*. If he finds himself confronted with a foreign provision that institutes the unilateral repudiation of a wife by her husband (the Islamic institution of *talaq*), the judge will evidently refuse the application of this institution and will hold that the marriage continues to exist, unless the wife has consented to the divorce. In such a case he may have to seek in the foreign law that is normally applicable in the case before the court an institution similar to the Greek institution of divorce by mutual consent. Consequently, either the specific legal situation with regard to the divorce will remain unresolved (in which case the marriage will continue to exist) or, insofar as it cannot remain unresolved, it will be resolved either in accordance with some other provision of the applicable law or in application of the *lex fori*.<sup>34</sup>

### III. THE INCIDENTAL QUESTION OF DIVORCE AND OF LEGAL SEPARATION AND THE *ORDRE PUBLIC* RESERVATION

As we know, in his assessment of the applicable foreign provision for the purpose of determining whether its application in the domestic legal situation is reconcilable with the perceptions of our society regarding justice and morality, the judge of the forum weighs this *in concreto* and not in the abstract. For this reason the judge does not assess the foreign provision in itself, but rather the effect of its application in the specific instance, since it is entirely possible that the provision in question may be held to be contrary to Greek public policy in one case and not in another.

Thus, it has been argued, the public policy of the forum is injured when for example the judge must apply the institution of *talaq* in the law of an Islamic country in order to grant a divorce, while it is not injured when the judge has merely to decide upon the awarding of maintenance to the wife of a Muslim man who divorced his wife in this manner in his own country.<sup>35</sup> Greek law and order, consequently, is injured when the institution of *repudium* is brought before it as a

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32. E. Krispis *supra* note 1, at 368; S. Vrellis, *supra* note 3, at 60.

33. Z. Papassiopi-Passia, *supra* note 4, at 203.

34. S. Vrellis, *supra* note 3, at 61; S. Vrellis *supra* note 1, at 80; E. Krispis, *supra* note 1, at 329; G. Maridakis, *supra* note 1, at 360; D. Evrigenis, *supra* note 1, at 174.

35. P. Lagarde, *supra* note 18, at 269; I. Fadlallah, *supra* note 18; see Cour de Cassation de 18 décembre 1987, RevCrit 733 (1989), commented by M.L. Niboyet.

principal matter, and is not injured when the judge is ruling upon an existing situation which has developed consequences in the context of the foreign law. In other words, when the institution of *repudium* is brought before the judge of the forum as an incidental question, the public policy of the *lex fori* is not injured.

Indeed, depending on the facts of each individual case, the application of foreign law may be contrary to the public policy of the forum to a greater or a lesser degree. The incidental questions that are brought before the judge of the forum for his ruling in the resolution of the principal matter appear in the form of vested rights which, as is natural, do not provoke the same reaction in the public order of the forum as they would if they were the principal matter at issue, when the judge would be required to create or recognize these situations for the first time.<sup>36</sup>

We see, therefore, that there is a certain elasticity in the manner in which we address different cases of application of the same provision of applicable foreign law. Elasticity is, moreover, one of the main features of the public policy reservation, together with its status as an exception, its indefiniteness and its variability over time.<sup>37</sup> French theory on private international law formulates this elasticity by speaking of the "attenuated effect" (*effet atténué*)<sup>38</sup> of the public policy reservation in the face of vested rights, while Prof. D. Evrigenis amends the above definition to speak of the "attenuated collision"<sup>39</sup> of the applicable foreign law with

36. D. Evrigenis, *supra* note 1, at 171; E. Krispis, *supra* note 1, at 388; G. Maridakis, *supra* note 1, at 357; A. Grammaticaki-Alexiou, et al., *supra* note 1, at 83.

37. P. Vallindas, *Le principe de l'élasticité de la réserve de l'ordre public et les réserves spécialisées*, in *Revue Hellénique de Droit International* 55 (1950); P. Lagarde, *supra* note 2.

38. P. Lagarde, *supra* note 2; Ph. Francescakis, *Ya-t-il du nouveau en matière d'ordre public?*, in *Travaux du Comité Français de Droit International Privé* 149 (1966-1969); Batiffol & Lagarde, *Traité de Droit International Privé* I 594 (8th ed. 1993).

The theory of the "attenuated effect" of the public policy reservation argued by Pillet and Mancini is based on the respect of states for foreign sovereignty, and requires that *fora* refrain from calling upon the rules of their own public policy. On this basis, France accepted the validity of a polygamous marriage celebrated abroad, in order to rule upon the ordering of maintenance for the second wife of a polygamous Muslim (The Chemouni case, *Cour de Cassation*, 28 Jan. 1958, *RevCrit* 1958, 110, comments by Jambu-Merlin). The most common case where the public policy reservation in France has an attenuated effect in regard to the unilateral divorce (repudiation) of a wife by a Muslim husband, is the situation where a wife resident in France brings an action before the French courts demanding support from her husband. In such cases the husband frequently obtains a divorce by *talaq* in his country of origin before the proceedings in the French courts have been completed, and subsequently pleads this divorce before the French courts as grounds for refusing to assume his family obligations.

The case in point is marked not only by the reservation of public policy, but also by a fraud, which leaves the French judge free to decide upon his course of action. What is of primary importance to him is to ensure that some form of maintenance is secured to the wife, whether or not he considers that the marriage has been dissolved.

39. D. Evrigenis, *supra* note 1, at 171. According to him there is no question of an attenuated effect of the public policy reservation.

The public policy reservation, as the expression of the fundamental perceptions of the legal situation of the judge of the forum, operates with unchanging intensity. The state does not modify the hard core of its perception of justice at any given point in time according to changes in circumstance. . . . By contrast, the applicable rule of foreign law may, according to the circumstances of the specific application in each instance, conflict more or less strongly with public policy, thus permitting the corresponding rejection or acceptance of its

public policy. According to this theory of "attenuated collision," the judge must in each case decide upon the compatibility of a situation already created in a foreign state with the public policy of the forum and, particularly, assess *in concreto* the consequences that will ensue if the said situation is permitted to develop effects in the forum.<sup>40</sup>

In order to explain this "loose" collision of the applicable foreign law to the domestic public policy, German theory on private international law has formulated the doctrine of *Inlandsbeziehung* or *Binnenbeziehung*.<sup>41</sup> According

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application in the state of the forum.

For this reason he proposes the term "attenuated collision" of the applicable rule of foreign law with public order as more correct.

40. Even with the theory of the "attenuated collision" of the public policy reservation with the public order of the forum, French judges frequently found themselves in very difficult circumstances with such Islamic institutions as polygamy and repudiation, even when these were brought before the courts as incidental matters. (K. Elgeddawy, *Relations entre systèmes confessionnel et laïque en droit international privé*, 239 (1971). Thus, in the Baaziz case heard by the French *Cour de Cassation* on February 17, 1982 RevCrit 275 (1983), comments by Y. Lequette, and July 6, 1988, RevCrit 71 (1989), comments by Y. Lequette), the suit brought by the second wife of the deceased Muslim husband seeking a share of the pension awarded upon his death to his first, French, wife was rejected, even though this second polygamous marriage had been recognized as valid. The French *Cour de Cassation* found that the reservation of French public policy was opposed to the case of a polygamous marriage celebrated abroad—where it also developed consequences because these consequences prejudiced the French lawful first wife of the deceased.

Similar difficulties appeared with regard to the institution of repudiation (*talaq*), where in the spirit of the theory of the attenuated effect of the public policy reservation (*effet atténué*) France recognized unilateral repudiations which had taken place abroad. According to P. Lagarde, *supra* note 18, at 269, this has recently ceased to be the case, as a result of the multiplication of cases like that of Chemouni case (Cour de Cassation de 28 janvier RevCrit 110 (1958), commented by Jambu-Merlin) where a Muslim husband, usually a citizen of Morocco or Algeria resident in France, returns to his country of origin and divorces his wife by repudiation while a suit is pending against him in the French courts seeking to oblige him to assume his family obligations or provide maintenance for his wife. According to the theory of the *effet atténué* of the public policy reservation, the dissolution of the marriage effected abroad by repudiation should be recognized, since this law is demonstrated as applicable by the pertinent conflict rule in French private international law. However, such recognition by the French courts entails consequences that touch upon French public policy to the point where they come into obvious conflict with it.

According to P. Lagarde, *supra* note 2, at 270, the theory of the *effet atténué* of the public policy reservation can no longer be accepted, except when both the institutions concerned take place abroad and their consequences are experienced abroad. Lagarde argues that when these consequences are experienced in the forum, then the mechanics of the public policy reservation should once again come into play to reject them.

41. About the end of the nineteenth century Franz Kahn, in *Die Lehre vom ordre public (Prohibitivgesetze)* (included in the volume *Abhandlung zum internationalen Privatrecht I*, 1928, pp. 161), observed that the circumvention of the application of applicable foreign law in favor of the application of the law of the forum only took place when there was a close connection between the forum and the legal relationship under adjustment. This connection, this *Inlandsbeziehung*, corresponded in his view to a subsidiary connecting factor, which gave the right to apply certain rules of the substantive law of the forum, thus correcting a deficiency in the existing rules of conflict. For this theory see P. Lagarde, *supra* note 18, at 270; H. Gaudemet-Tallon, *La désunion du couple en droit international privé*, in RCADI 226, 239 (1991-I); S. Vrellis, *supra* note 1, at 19; E. Vassilakakis, *The Testamentary Succession in Private International Law (in Greek)* 223 (1994); as well as Weitz,

to this theory, the public policy reservation is ineffective when the case before the court has no strong connection with the legal situation in the forum. On the basis of the doctrine of *Inlandsbeziehung*, what matters is not so much to determine whether the right in question was or was not acquired abroad, but rather to determine whether or not the connecting factor between the situation to be adjusted and the forum represents a close connection.<sup>42</sup>

All the efforts that have been made through the theories of *effet atténué* and *Inlandsbeziehung* notwithstanding, we cannot say that the problem has been resolved, since the numbers of cases that the judge of the forum is called upon to resolve are constantly increasing and each case, being special, has to be examined *in concreto*. For this reason international theory, especially in those European countries with heavy immigration from Islamic states, has proposed a number of solutions, without, however, achieving any notable success.<sup>43</sup>

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*Inlandsbeziehung* und ordre public in der deutschen Rechtsprechung zum internationalen Familienrecht, zugleich ein Beitrag zur Reform des internationalen Familienrechts, 1981, with many examples; and A. Bucher, *L'ordre public et le but social des droits en droit international privé* 239 RCADI 9, 52 (1993-II).

In determining whether a dissolution that is lawful under the foreign applicable law is contrary to the public order of the forum, the judge takes into account the fact that this foreign applicable provision causes only minor offense to his sense of justice and has little or no connection with the state of the forum. The premise of *Inlandsbeziehung* is connected with the national character of public order, which is not injured except to the extent that the dissolution which is provided for in the applicable foreign law could in the specific instance have appreciable consequences in the forum.

In Germany as E. Jayme tells us in "*Identité culturelle et intégration: Le droit international privé postmoderne*", 251 RCADI 9,233 (1995) there was a tendency not to plead the reservation of public policy when all the members of a family were of foreign nationality. However, the German *Bundesgerichtshof* recently changed its jurisprudence in a case concerning paternal authority in a family of Iranians. According to the above court, it is sufficient for a foreign family that is habitually resident in Germany to confirm the existence of *Inlandsbeziehung* and in this manner to avoid the application of Iranian law, which excludes the mother from parental care without taking the interests of the child into account. (BGH 14 Oct. 1992, IPRax 102 (1994)).

42. Consequently, in the case of repudiation cited above, that is, the case of a Muslim husband who returned to his country of origin and divorced his wife by repudiation while a case seeking to oblige him to assume his family obligations was pending before the French courts, there is a connection of *Inlandsbeziehung* with the French forum. There is a connecting factor with France because the family was settled there, a connecting factor that becomes even closer when the nationality of the wife bringing the action is French.

The Supreme Court of Bavaria, in a decision handed down on November 30, 1981 (IPRax 104 (1982)), annotation by D. Heinrich, argued the reservation of public policy in a case of repudiation that took place in Cairo against a German woman by her Egyptian husband in order to refuse recognition of the divorce in Germany. According to D. Heinrich, *Internationales Familienrecht* 115 n.104 (1990), "we cannot say, however, whether the German judge would do the same thing if the wife in this case were Egyptian rather than German."

43. For these solutions see J.Y. Carlier, *Autonomie de la volonté et statut personnel*, 1992; H. Gaudemet-Tallon, *supra* note 41, at 233; P. Lagarde, *supra* note 18, at 278; J. Déprez, *supra* note 18, at 200.

## IV. ONE LAST WORD

In Greece, theory and jurisprudence on private international law in matters of international family relations, including the dissolution of a marriage, maintain a conservative position following the well-trod classical rules of conflict of laws. Given Greece's position within a European legal context, however, together with the steady increase in the number of cases with a foreign element, among other things because of the flood of immigration, they are beginning to accept the impact of the new trends that are forming in Europe and on the international legal scene. This finds confirmation in the sharp decrease in the use of the public policy reservation and the change in how and why this clause is invoked by the Greek judge in divorce cases.

